

Questions & Answers
Concerning E.D.Mo. L.R. 4.05 --
The New "Motion Package" Rule

1. To what motions does the new rule apply?

Rule 4.05 applies to all motions to dismiss and motions for summary judgment filed after August 1, 1998 in civil cases other than Social Security appeals, except cases in which one or more parties appear pro se. In cases with a pro se party, the old briefing procedures of Rule 4.01(B) and (C) continue to apply.

2. What is the relationship between the old briefing times prescribed in Rule 4.01(B) and (C) and the new motion package rule?

The two rules are mutually exclusive. Where the motion package provisions of Rule 4.05 apply, the briefing times prescribed in Rule 4.01(B) and (C) do not govern. Where the motion package provisions of Rule 4.05 do not apply -- for example, with respect to a non-dispositive motion or in a case with a pro se party -- Rule 4.01 still provides the times for filing a memorandum in opposition and a reply memorandum.

3. The Case Management Order says, e.g., "motions to dismiss, for summary judgment or for judgment on the pleadings must be filed no later than August 15, 1998." Where the motion package rule applies, what must be filed in order to satisfy this deadline?

Rule 4.05(A)(2) provides that the notice of motion, filed in place of the motion itself, satisfies any motion deadline established by law, local rule or court order. The motion package is not required to be filed by the motion deadline.

4. What must the notice of motion contain?

Rule 4.05(A)(2) requires that the notice of motion be filed on a form provided by the Court, and include a certificate of service indicating the date on which the motion was served, as well as the nature of the relief sought by the motion. Blank "notice of motion" forms are available from the Clerk's Office. The "nature of the relief sought" includes the type of motion, the parties and claims to which it is directed, and a brief statement of the grounds for the motion.

5. When is the motion package due?

The motion package is due no later than 40 days from the date the notice of motion is filed with the Court. Fed.R.Civ.P. 6(e) shall

not apply to add 3 days for mailing to the 40-day total. If the 40th day is a Saturday, Sunday or legal holiday, then in accordance with Fed.R.Civ.P. 6(a) the motion package shall be due on the next business day on which the Court is open.

6. How are the parties to divide the forty-day period for briefing the motion?

Rule 4.05 does not prescribe the manner in which the forty days are to be divided, but does require the parties to cooperate in planning a reasonable division of the time. Rule 4.05(B) contemplates that the movant should ordinarily have at least five days in which to prepare a reply. A division of 30 days for the preparation and service of the memorandum in opposition and 10 days for the preparation of the reply and filing of the motion package might be an appropriate starting point from which to negotiate.

7. When the movant has served a motion to dismiss or for summary judgment on his opponent, and does not receive a memorandum in opposition, what should he do?

No later than the due date for the motion package, the movant shall submit the motion and the memorandum required by Rule 4.05(D), along with a motion for leave to file an incomplete package, explaining that the opponent failed to provide any memorandum in opposition.

8. Rule 4.05(B) appears to contemplate that the movant should ordinarily have at least five days in which to prepare a reply. What should the movant do if she receives her opponent's memorandum in opposition fewer than 5 days prior to the deadline for filing the motion package?

If the movant desires a full five days in which to draft a reply, she must seek an extension of the deadline for filing the motion package. As always, the movant has two options. The first is to seek the extension ahead of time, separate from the submission of the motion package. The second is to submit the motion package several days late with a motion seeking leave to file it out of time, explaining the circumstances of the opponent's late service. Counsel may wish to consult with the staff of the judge handling the case to determine whether he or she has a preference between these options.

9. If the parties want additional time in which to file the motion package, what must they do?

The parties should make every effort to complete the briefing of a motion in time to allow the motion package to be filed within the

40-day period. Because this period represents an increase over the otherwise applicable briefing schedule under Rule 4.01 -- a substantial increase with respect to motions to dismiss -- the Court will likely be unwilling to grant extensions of time in the absence of compelling reasons. This is particularly so where the parties have had input into the selection of the dispositive motion deadline, which has been carefully selected both to allow the parties reasonable readiness to brief such a motion and the Court sufficient time to rule upon the motion prior to trial. Rule 4.05(C) states a presumption that motions for extension of time will be joint, representing the Court's expectation that counsel will reasonably cooperate in the formulation of a briefing schedule under the rule. This expectation is also conveyed in the requirement that a motion which is not joint shall contain a certificate of attempt to resolve the issue. In this context, a joint motion is not required to be signed on behalf of each party, but may instead contain the representation of the filer that the motion is joined in by counsel for all other parties. A motion for an extension of time should be filed as soon as possible, and should contain an explanation of the good cause proffered for the extension sought. Note that the motion should only request an extension of the time for filing the motion package, not additional time to file an individual response or reply.

10. If a party wishes to file an over-length memorandum in support of or in opposition to a motion, what must he do?

The 15-page limit of Rule 4.01(D) applies to motions subject to the motion package requirement of Rule 4.05. Rule 4.01(D) has been amended to clarify that the separate attached statement of material fact now required under Rule 4.01(E) in conjunction with a summary judgment motion is not counted toward the 15-page limit. The last sentence of Rule 4.05(B) provides that a motion for leave to file a pleading in excess of the page limit is to be filed separate from the motion package, but that such a motion may be filed ahead of the motion package or on the same day as the motion package. If a party opposing a motion wishes to seek leave to file an over-length memorandum at the same time as the motion package is filed, and timely provides a motion seeking such leave to the movant, the movant should file the motion along with the motion package.

11. If a party wishes to file a part of the motion package under seal, what must she do?

She should submit a motion for leave to file under seal along with the motion package. The motion should clearly identify that portion of the package sought to be placed under seal, and state the reason for the request. If a party opposing a motion wishes to seek leave to file its memorandum or an exhibit thereto under seal, and timely provides a motion seeking such leave to the movant, the movant should file the motion along with the motion package.

12. How many copies does the motion package rule require?

Rule 4.05(D) requires the filing of the original and two copies of the motion package. In this respect, the motion package rule differs from Rule 2.01(C)'s general filing requirement of an original and one copy. Rule 4.05(D) further requires that each party opposing a motion provide the movant with the number of copies of his memorandum and other materials which are required to be filed. Including the service copy for the movant to keep and the original for the court file, an opposing party should serve four sets of its opposition on the movant.

13. How physically should the motion package be presented?

The package to be filed pursuant to Rule 4.05(D) shall consist of:

- a cover memorandum listing in date order each of the documents being submitted;
- the original motion, memoranda, exhibits and attachments, arranged in date order;
- the movant's certification that the package is complete or a motion for leave to file an incomplete package; and
- any motions for leave to file out of time, for leave to file excess pages, or for leave to file under seal.

Two additional copies of the entire package are also required to be submitted. Each constituent part of the package should be stapled. The original package to be filed should not be bound other than by clipping or banding together the constituent parts, as each document for filing will be separately docketed. A form cover memorandum to accompany the motion package filing is available from the Clerk's Office.

14. If a party wishes to join a dispositive motion with an alternative request for non-dispositive relief (e.g. motion to dismiss or in the alternative motion for more definite statement), does Rule 4.05 apply?

Rule 4.05 will apply in all respects to any eligible motion seeking dispositive relief, even though non-dispositive relief is requested in the alternative. The moving party should file the notice of motion reciting fully the nature of relief sought. All grounds in support of and in opposition to the relief and any alternatives should be briefed and argued in a single motion package.